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### Deposited in DRO:

10 October 2019

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Bevan, Chris (2019) 'The search for common intention : the status of an executed, express declaration of trust post-Stack and Jones.', Law quarterly review., 135 . pp. 660-681.

### Further information on publisher's website:

<https://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=473productid=7116>

### Publisher's copyright statement:

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# THE SEARCH FOR COMMON INTENTION: THE STATUS OF AN EXECUTED, EXPRESS DECLARATION OF TRUST POST-STACK AND JONES

Chris Bevan\*

## I. INTRODUCTION

In the seminal cases of *Stack v Dowden*<sup>1</sup> and *Jones v Kernott*<sup>2</sup> the highest courts in the land attempted to bring clarity and simplicity to the law on disputes arising as to the ownership of property where the extent of co-owners' beneficial entitlements has not been recorded in an express declaration of trust. However, despite being two of the most important property law cases of the last century, these historic judgments raised almost as many, if not more questions than they answered.<sup>3</sup> One outstanding question that remains largely unresolved is how far a properly executed declaration of trust (whether as part of a TR1 form - the form needed to transfer registered titles – or contained in a separate instrument) is definitive of the parties' beneficial interests in the property. Put differently, as the legal landscape has shifted towards a more holistic, broad brush, highly contextualised approach to the assessment of parties' common intentions post-*Stack* and with the acceptance, in *Jones*, of the ambulatory constructive trust, to what extent is the court permitted to go behind the clearly-stated intentions of the parties evidenced in an express declaration in order to infer a new bargain as to beneficial ownership? It is to this important issue of formality that this article is directed. Despite a long-standing acceptance that a formally executed declaration of trust is conclusive and binding as to parties' respective beneficial entitlements<sup>4</sup> (subject to vitiating factors), this position is now under increasing threat. Legal practitioners and some members of the judiciary are challenging and seeking to undermine the established orthodoxy by relying on the highly discretionary and flexible approach to common intention heralded by the rationalisation of the law in *Stack* and *Jones*.

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<sup>1</sup> *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432.

<sup>2</sup> *Jones v Kernott* [2011] UKSC 53; [2012] 1 A.C. 776.

<sup>3</sup> See, for example, the discussion as to *Stack*: Gray & Gray, *Elements of Land Law*, 6th edn (Oxford: Oxford University Press, 2009) at [7-072]; W. Swadling, "The Common Intention Trust in the House of Lords: An Opportunity Missed" (2007) 123 L.Q.R. 511; M. Dixon, "The Never-Ending Story – Co-Ownership After *Stack v Dowden*." [2007] Conv. 456; and as to *Jones*: H. Blehler, "The scope of common intention constructive trusts: where to draw the line?" 32(2) Tru. L.I., 63; A. Hayward, "Common intention constructive trusts and the role of imputation in theory and practice" [2016] Conv. 233; J. Mee, "Jones v Kernott: Inferring and Imputing in Essex" [2012] Conv. 167.

<sup>4</sup> *Goodman v Gallant* [1986] Fam. 106; [1986] 1 All E.R. 311; for a discussion of *Goodman*, see S. Gardner, "Understanding *Goodman v Gallant*" [2015] Conv. 199.

This significant and live issue has been drawn into sharper focus by two recent and under-explored cases *Clarke v Meadus*<sup>5</sup> and *Pankhania v Chandegra*<sup>6</sup> which send conflicting messages on the question. Resolving this issue is, however, important not just for the clarity of the law but also, crucially, for those advising clients on how best to protect their property interests, to minimise the prospect of litigation and safeguard themselves against future claims and disputes. This article examines this thorny, under-examined issue and, drawing on decided case law, argues that the primacy of a properly executed declaration/TR1 form should be asserted and that, in the absence of vitiating factors, or subsequent variation of agreement by formal deed (or potentially via the doctrine of proprietary estoppel), the expressly recorded intentions of the parties should be the start and end point in determining co-owners' common intentions as to beneficial ownership. The article proceeds in 4 parts: a first part reflects on why this issue matters both for the clarity of the law and the day-to-day work of legal practitioners; unpacks the nature of the TR1 form and identifies some of the inherent, practical difficulties with it; a second section locates and scrutinizes the conventional property law wisdom and orthodoxy as to the conclusiveness of express declarations of trust. A third part explores how the cases of *Stack* and *Jones* impact on, amplify and constitute a challenge to this conventional wisdom as well as how the court in the more recent judgments of *Meadus* and *Pankhania* has interpreted the status of express declarations. Finally, the case is made for asserting the primacy of express declarations; that current, strict case law precedent does not permit the possibility of informal variation of an express declaration under a constructive trust and, looking forward, if such informal variation is to be sanctioned, it must be clearly delimited and circumscribed. It is contended that, on the grounds of principle, precedent and pragmatism, the conventional property law wisdom which holds that express declarations of trust are decisive and binding should be (re-)asserted, that *Stack* and *Jones* has been interpreted too expansively by the court and practitioners, that formalism in the law be championed and enforced and that a Supreme Court judgment may be warranted to settle definitively this important question.

## II. WHY THIS ISSUE MATTERS AND THE TR1 FORM

This issue matters and has wide implications because it has direct practical consequences for those giving legal advice and representing clients involved in disputes about property and goes to the issue of how far purchasers can protect themselves from future legal claims by executing express declarations which lay down their intentions as to how their property is to be held. The practical importance of this issue was noted by Schofield<sup>7</sup> who reached the uneasy conclusion that a party cannot contract out of any future claim by executing an express declaration but explained that the matter remained unresolved.

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<sup>5</sup> *Clarke v Meadus* [2010] EWHC 3117 (Ch); [2010] 12 WLUK 4.

<sup>6</sup> *Pankhania v Chandegra* [2012] EWCA Civ 1438; [2012] 11 WLUK 290.

<sup>7</sup> G. Schofield, "Is a properly completed TR1 definitive in a cohabitation dispute?" [2016] *Fam. Law* 1257.

The purpose of this article is to take up and expand on Schofield's contention, to probe more deeply into the vexed issue of express declarations and to offer clarity to the question of the status of express declarations. Since the decisions in *Stack* and *Jones* two differing views as to the inviolability of the TR1 (properly executed as a deed) have emerged in practice: first, a strict land law approach which regards an executed express declaration as conclusive and binding in the absence of fraud, mistake or other vitiating factors;<sup>8</sup> and secondly, the emergence of a more "holistic" and familial approach which accepts that the intentions of the parties can change, even where an executed TR1 is in existence<sup>9</sup> and supported by an acknowledgment of Land Registry in its guidance on the TR1 form that joint owners' intentions may change over time.<sup>10</sup> These two different approaches are perhaps symbolic of the clash which can sometimes occur more generally between the two different disciplines of land law and family law, the former with its demands for formality and certainty and the latter placing a much greater emphasis on discretionary factors and "fairness". These two disciplines necessarily collide when disputes arise as to co-owned land which is purchased as a family home. That said, it is argued here that there is a need to underscore the primacy of the expressly-negotiated and agreed terms of an express declaration and, moreover, to resist the too-often, unthinking belief of some legal practitioners that *Stack* and *Jones* gave sanction to a discretion to unpick expressed intentions.

Disputes over co-owned land characteristically involve disagreement about the extent of co-owners' beneficial entitlement to the property with, for example, one side claiming to be wholly entitled to the land which is strongly resisted by the other or, alternatively, one or other party claiming to be entitled to a greater share of the equity than the parties appeared to have bargained for at the outset of their co-ownership relationship. This makes determining what the parties actually intended when they acquired the co-owned land utterly essential.<sup>11</sup> Given that those entering a co-ownership arrangement only very infrequently complete a separate trust deed elucidating their intentions, attention routinely falls on the TR1 form (the form used to transfer registered titles) to offer clarification as to how the parties intended the co-owned land be held. The TR1 form, in use since 1999, has long been viewed as an unsatisfactory and flawed vehicle for parties to express their intentions as to the beneficial interests in co-owned land

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<sup>8</sup> See *Goodman v Gallant* [1986] Fam. 106; also J. Wilson Q.C., *Cohabitation Claims: Law, Practice and Procedure* 2<sup>nd</sup> edn (London: Sweet & Maxwell, 2015) at [4.181]; E. Darlington and L. Heaton, *Cohabitation and Trusts of Land* 2<sup>nd</sup> edn (London: Sweet & Maxwell, 2016), Chapter 2.

<sup>9</sup> P. Duckworth, *Duckworth's Matrimonial Property and Finance* (London: Bloomsbury, 2017), Section 1, at [11].

<sup>10</sup> HM Land Registry, 'Guidance: how to complete form TR1' (May 2018); discussed further below; available at: <https://www.gov.uk/government/publications/registered-titles-whole-transfer-tr1/guidance-completing-form-tr1-for-the-transfer-of-registered-property> [*last accessed* 11 October 2018].

<sup>11</sup> For criticism of the court's search for common intentions, see amongst others: N. Glover., P. Todd, "The myth of common intention" 16(3) L.S. 325.

but attempts to ameliorate this position via the introduction of a new Joint Ownership or ‘JO’ form<sup>12</sup> have essentially stalled as this form, which is additional to the TR1 and voluntary, is very rarely utilised in practice.<sup>13</sup> The result is that the TR1, in particular, panel 10 of the form, however imperfect, remains the focus point for considering how co-owned land is being held and the parties’ intentions as to how they are to share the land beneficially. Panel 10 serves as a declaration of trust and provides the parties with the opportunity to tick one of three boxes to indicate that they hold the co-owned land (1) as joint tenants; or (2) as tenants in common in equal shares or (3) according to another division (to be specified by the parties in the space given). This makes a properly executed TR1 form, and panel 10 more precisely, fundamental in the determination of the parties’ common intentions. It is instructive, however, to reflect on just how much protection ticking of one of the boxes in panel 10 of the TR1 actually provides. In theory, a properly executed TR1 form in which the parties indicate how the property is to be held should be water-tight evidence of the parties’ wishes; providing indisputable confirmation of the parties’ intentions as to beneficial ownership after having received the necessary legal advice as to the implications of this declaration of trust. Three preliminary points must, however, be borne in mind. First, in practice, it is not in fact mandatory for any of the three boxes in panel 10 to be ticked and indeed, although Land Registry are under an obligation to enter a Form A restriction by default where neither panel 10 of the TR1 or a separate JO form is completed, it is relatively commonplace to encounter Land Registry registering a TR1 form where there is no indication at all as to beneficial ownership and no JO form. Secondly, there is a growing evidence base both anecdotal and empirical that property solicitors and conveyancers are offering only very generic and superficial advice to those entering a co-ownership arrangement as to the significance of panel 10 and of the implications of not stating their clear, express intentions in the event of dispute or relationship breakdown. In addition, there is a body of research highlighting that advice given is often poorly expressed and delivered and habitually not grasped meaningfully by clients.<sup>14</sup> Thirdly, there is an acknowledgment by Land Registry itself in its TR1 guidance that casts a measure of doubt on the status of a completed TR1 form; noting that:<sup>15</sup>

“Joint ownership is a difficult area of the law. It can lead to disputes when a joint owner dies or the relationship between joint owners breaks down. Recording the joint owners’ intentions in panel 10 of

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<sup>12</sup> On which see Law Society Practice Note, *Joint Ownership*, on the nature and use of the JO form (published 14<sup>th</sup> January 2013); available at: <https://www.lawsociety.org.uk/support-services/advice/practice-notes/joint-ownership/> [last accessed 11 October 2018].

<sup>13</sup> On which see A. Moran, “Anything to declare? Express declaration of trust on Land Registry form TR1: the doubts raised in *Stack v Dowden*” [2007] Conv. 364.

<sup>14</sup> M. Pawlowski., J. Brown, “Joint purchasers and the presumption of joint beneficial ownership - a matter of informed choice?” (2013) 27(1) Tru. L.I. 3.

<sup>15</sup> HM Land Registry, *Guidance: how to complete form TR1* (May 2018) at [3.10].

the transfer or in a separate form JO ... may help to avoid such disputes later on. However, this is only a starting point, as the joint owners' intentions may change over time."

How far then, is a properly executed TR1 form or express declaration of trust conclusive as to the beneficial entitlements of co-owners? An important factor in addressing this question is the influence of the approach of the court, as clarified in *Stack v Dowden* and confirmed in *Jones v Kernott*, in determining disputes over co-owned land where there is no express declaration of trust. Such disputes, if the parties have jumped the hurdle of proving they actually have an interest in the property, fall to be determined by identifying the common intentions of the parties as to how the land is to be shared in equity. As is now well-trammelled and well-documented, the court's assessment of common intention proves to be highly flexible, indeterminate, academically controversial and, in the domestic context in the absence of objective facts from which intentions are inferred, common intention may even be imputed by reference to what is considered fair having regard to the whole course of dealing and relationship of the parties often reaching back several decades. In light of this, practitioners and some members of the judiciary are increasingly prepared to undermine clear and documentary evidence of common intention (whether a separate declaration or a TR1) in favour of the more holistic, unwritten, informal evidence of shifting party intention as endorsed by the House of Lords in *Stack* and Supreme Court in *Jones*. While there are evidently grounds for being cautious as to the inviolability of the TR1 form and cognisant of its short-comings, it is argued here that if the parties' intentions are clearly expressed in an express declaration of trust or TR1, these intentions should be upheld and the declaration should not only be the starting point as to common intention but, in the absence of vitiating factors, variation by subsequent deed or potentially via proprietary estoppel, should settle the matter decisively. This approach, as it will be contended in this article, is faithful to conventional property law wisdom, to binding case law precedent and, equally, is justified on the grounds of pragmatism. What, then, is the source of this conventional property law wisdom that a clear express declaration of trust is conclusive and binding as to parties' intentions and how has this orthodox, 'formality first' approach been challenged by recent case law developments? It is to this that we now turn.

### **III. LOCATING THE CONVENTIONAL, PROPERTY LAW WISDOM**

As Dixon has keenly observed, the extent to which parties when dealing with land should "embody this bargain in a written instrument is [an issue] of profound importance, as well as profound disagreement".<sup>16</sup> Land law traditionally (and traditional land lawyers) insist that dealings with land comply with formality requirements if they are to be effective and operate at law. One need look no further than the Law of Property Act 1925 (LPA 1925). Section 52 of the LPA 1925 thus provides that

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<sup>16</sup> M. Dixon, "To write or not to write?" [2013] Conv, 1.

a conveyance of a legal estate in land or any interest therein must be made by deed. This insistence on formality is further bolstered by section 53 which makes plain that any declaration of trust over land or any interest therein must be manifested and proved by some writing. The conventional, property law wisdom therefore holds that when parties enter a co-ownership relationship (which necessarily operates under a trust of land), if there is an express declaration of trust executed by the parties as a deed then unless it is capable of being set aside on the grounds of fraud, mistake, undue influence, duress or has been subsequently varied then that declaration is conclusive and binding. Little direct, judicial consideration has been given by our highest courts to the scope and status of the TR1 form itself, however. This is perhaps unsurprising as, in its current guise, the TR1 has only been in place since 1999 and therefore was not pertinent to the property transfers in dispute in the leading cases of *Stack* and *Jones*. Given that panel 10 of the TR1 itself constitutes a declaration of trust, discussion by the court as to the status of express declarations of trust is by extrapolation not just pertinent but deeply instructive as to how the TR1 form should be interpreted.

The oft-cited authority for the conventional wisdom as to the immutability of an express declaration of trust and a case that is still routinely referenced today is the Court of Appeal decision of *Goodman v Gallant*.<sup>17</sup> Mrs Goodman enjoyed a 50% beneficial interest in the matrimonial home; legal title being in her husband's sole name. Mr Goodman left the home and Mrs Goodman began a relationship with Mr Gallant who moved into the property. Two years' later, they entered negotiations to buy out Mr Goodman's 50% interest in the house and there was an express declaration of trust that the purchasers held the property as joint tenants. Mrs Goodman subsequently sought to argue she was entitled to a 75% beneficial interest on the basis that she already owned a 50% share in the property and had then paid half the balance in buying out Mr Goodman. The court rejected this holding that she was only entitled to a 50% share. Slade L.J. held that, in the absence of fraud or mistake at the time of the conveyance, the declaration of trust must stand and was conclusive as to the parties' beneficial ownership. *Goodman* followed and drew on a line of authority upholding express declarations of trust as binding and rejecting the possibility of informal variation of such declarations on the basis of post-acquisition party conduct. In *Wilson v Wilson*,<sup>18</sup> a case which Slade L.J. endorsed, the Court of Appeal held that it had no power to go behind an express declaration of trust to award a husband more than the agreed 50% equitable interest in circumstances where he had made significant post-acquisition mortgage contributions. Slade L.J. also followed the now famed dicta of Lord Upjohn in *Pettitt v Pettitt*<sup>19</sup> who had explained in no uncertain terms that:<sup>20</sup>

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<sup>17</sup> *Goodman v Gallant* [1986] Fam. 106.

<sup>18</sup> *Wilson v Wilson* [1963] 1 W.L.R. 601; [1963] 2 All E.R. 447.

<sup>19</sup> *Pettitt v Pettitt* [1970] A.C. 777; [1969] 2 All E.R. 385 at 813 (Lord Upjohn).

<sup>20</sup> *Pettitt v Pettitt* [1970] A.C. 777 at 813 (Lord Upjohn).

“[T]he beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some ... conveyance which shows how it was acquired. If that document declares not merely in whom legal title is to vest but in whom the beneficial title is to vest that **necessarily concludes the question ... for all time**, and in the absence of fraud or mistake at the time of the transaction **the parties cannot go behind it at any time thereafter.**” [Emphasis added]

The same result was reached in the cases of *Leake v Bruzzi*<sup>21</sup> and *Pink v Lawrence*.<sup>22</sup> In the former, the court held it could not overrule an express declaration that the parties held as joint tenants despite the husband being solely responsible for meeting the post-acquisition mortgage payments. In the latter case, which cited Lord Upjohn’s dicta in *Pettitt* with approval, the Court of Appeal rejected a claim by Mr Pink to be absolutely entitled to the land and refused to displace an express declaration of trust in circumstances where the defendant has contributed very little to the purchase price and whose name only appeared on the title deeds to satisfy the mortgage lender. The effect of this line of cases from *Wilson* to *Pettitt* to *Goodman* is to confirm the conclusiveness of an express declaration of trust and to establish what is termed in this article, ‘the conventional property law wisdom’ on the issue of the status of such declarations. Moreover, these cases serve as authority for the proposition that any argument based on post-acquisition conduct that, under the operation of a constructive trust, the terms of an express declaration of trust can be informally varied (i.e. without the formality of a subsequent, variation deed) must fail. That these cases represented settled law was tacitly accepted more recently in the Court of Appeal in *Clarke v Harlowe*<sup>23</sup> where the claimant jettisoned a claim to a 50% share of the proceeds of sale of a family home; acknowledging that the division of proceeds would necessarily and conclusively be governed by the terms of the extant express declaration of trust. As Judge Behrens explained at first instance:<sup>24</sup>

“It is clear from the cases cited by [Counsel] that that declaration is conclusive as to the beneficial interests in Bank House in the absence of fraud or mistake. There is no suggestion of mistake or fraud here. Hence the declaration is conclusive as between [the parties] and they are not permitted to go behind it.”

#### **IV. CHALLENGING THE CONVENTIONAL WISDOM: HOW FAR CAN AN EXPRESS DECLARATION BE VARIED INFORMALLY?**

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<sup>21</sup> *Leake v Bruzzi* [1974] 1 W.L.R. 1528; [1974] 2 All E.R. 1196.

<sup>22</sup> *Pink v Lawrence* (1977) 36 P. & C.R. 98 (CA); [1977] 11 WLUK 215.

<sup>23</sup> *Clarke v Harlowe* [2005] EWHC 3062 (Ch); [2007] 1 F.L.R. 1.

<sup>24</sup> *Clarke v Harlowe* [2005] EWHC 3062 (Ch) at [5].



It flows from the above discussion that despite strong authority that express declarations are to be taken as conclusive and binding as to the parties' respective beneficial interests that this position must, to an extent, be qualified and caveated. Even in the avowedly unequivocal judgment in *Goodman* and in the House of Lords in *Pettitt*, the point was conceded that express declarations were not wholly unassailable, wholly immutable and could, for example, be displaced if evidence could be adduced that demonstrated the declaration was tainted by mistake, fraud or, by extension, other vitiating factors. Yet, this is not the only basis upon which the conclusiveness of an express declaration of trust might be challenged. First, and as is often neglected, the terms of an express declaration may themselves explicitly provide that post-acquisition conduct or financial contributions by the parties may subsequently vary the beneficial ownership of the land as laid down in a prior declaration, for example, should a relationship come to an end at some point in the future. Beyond that, however, is the question of informal variation of an express declaration by other means. Here, a challenge to the validity of an express declaration is most likely to take one of two forms: first, an argument based upon the newly-expanded and highly discretionary, flexible legal landscape of the common intention constructive trust in the context post-*Stack* and *Jones*; and secondly, under the operation of the doctrine of proprietary estoppel. Both of these attempts to circumvent the expressly agreed terms of an express declaration represent a significant assault on the conventional property law wisdom on express declarations but also on land law's orthodox concern and insistence that, at least in all but exceptional circumstances, formalism should trump a broad, unfettered equitable jurisdiction. How far do these arguments in favour of varying informally an express declaration hold water?

That the express terms of a declaration of trust may not set in stone for all time the parties' respective equitable entitlements was recognised some decades ago in the statements of Davies L.J. in *Bedson v Bedson*<sup>25</sup> who noted that:<sup>26</sup>

"So whatever the documents may appear to say on their face, the court can reach the conclusion that, in reality, by express or implied agreement the true position was something different from that appearing on the face of the document. Unless, however, the court is satisfied on evidence that the parties expressly or by conduct did agree to a state of affairs other than that indicated by the documents, then the documents must prevail."

*Bedson* is admittedly an old case (it concerned s17 of the Married Women's Property Act 1882) and a decision which has since been significantly doubted, re-visited and rejected (including in *Goodman* itself). *Bedson* could, moreover and in any event on the passage cited above, be taken as limited to

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<sup>25</sup> *Bedson v Bedson* [1965] 2 Q.B. 666; [1965] 3 W.L.R. 891.

<sup>26</sup> *Bedson v Bedson* [1965] 2 Q.B. 666 at 685.

allowing for displacement of an express declaration where there is evidence of misrepresentation, fraud or some other unreality in its drafting. Davies L.J.'s comments may also be justifiably confined to the discretion given to the court under the 1882 Act to vary the existing proprietary rights of the parties. However, Davies L.J.'s suggestion and reference to "implied agreement" lays open, if nothing else, the spectre of variation of an express declaration by an informal agreement falling short of a deed but also other than by deed, for example, arising by inference from party conduct. It is here that the challenge to the conclusiveness of the express declaration is most keenly felt.

Bringing this debate up to date, the key flashpoint point in the modern discussion as to the possibility of informal variation of an express declaration must be the important albeit very succinct discussion of the matter in the landmark case of *Stack v Dowden*; a case which, as will be well-known to the readership, re-set, re-framed and revolutionised the approach taken to disputes as to beneficial ownership of co-owned land (in particular, in the domestic context). Indeed, *Stack* (and *Jones* which confirmed *Stack*) seems to offer, for some legal practitioners, the strongest basis on which to argue that an express declaration can be varied by post-acquisition, informal agreement as evidenced, for example, by contributions to mortgage payments or home improvements to co-owned property by way of a common intention constructive trust. As the majority in the House of Lords in *Stack* explained, the law had "moved on in response to changing social and economic conditions."<sup>27</sup> The exercise, in disputes as to beneficial ownership of land, held the court, was therefore "to ascertain the parties' shared intentions, actual, inferred or imputed ... in light of their whole course of conduct in relation to it."<sup>28</sup> This exercise required a more contextualised, more holistic and flexible approach to the court's assessment of parties' common intentions particularly in the domestic context; an approach subsequently affirmed by the Supreme Court in *Jones*.

The critical question, for the purpose of this article, is how far the assertions in *Goodman*, *Pettitt* and *Pink* establishing the conventional, property law wisdom survive the bold rationalisation of the law in *Stack* and *Jones*. Put differently, in this new, post-*Stack/Jones* landscape, must a written, express declaration of trust (hitherto accepted as authoritatively conclusive) bend to accommodate and, in essence, bow and yield to the conscience of equity under the flexible jurisdiction of the *Stack* and *Jones* liberated, constructive trust? A measure of guidance was offered by Hale in *Stack* itself. Hale explained that: "no one thinks that a declaration can be overturned, except in cases of fraud or mistake,"<sup>29</sup> and later that "no-one now doubts that ... an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see *Goodman v Gallant*."<sup>30</sup> Hale is at once

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<sup>27</sup> *Stack* [2007] 2 A.C. 432 at [60] (Baroness Hale).

<sup>28</sup> *Stack* [2007] 2 A.C. 432 at [60].

<sup>29</sup> *Stack* [2007] 2 A.C. 432 at [49].

<sup>30</sup> *Stack* [2007] 2 A.C. 432 at [67].

both emphatic as to the binding nature of express declarations and, simultaneously, unhelpfully ambiguous in muddying the waters by introducing the prospect of variation of a written declaration by “subsequent agreement.” Sadly, little further clarification is offered as to what would amount to such a “subsequent agreement,” and what limits there may be in terms of the degree of formality that such an agreement would need to satisfy. It is indisputable that variation of an earlier declaration of trust by subsequent deed would suffice for these purposes but whether an agreement short of a deed would be sufficient remains unclear. Hale’s reference to *Goodman* is surely, however, instructive in confirming the weight to be attached to express documentary evidence of party intention. Crucially, in *Stack* and in *Jones*, the properties in dispute had been transferred into the joint names of the parties in circumstances where there was no express declaration of trust (the TR1 form had not yet been introduced and the Land Registry form in use at the time did not contain any declaration of trust). The result was that the court was required to engage in a fulsome, highly contextualised, fact-dependent examination of the parties’ relationship and actions (financial and otherwise) to determine the parties’ common intention and quantification of the parties’ beneficial entitlements without the benefit of being able to have recourse to a clearly-expressed record of how the parties’ intended the properties to be held. Had there been a properly executed TR1 form indicating the parties clearly-expressed intentions as to how the properties in question were to be held, this would have made the task of the court far more straightforward; inevitably bounding their discussions to an examination of potential for arguments based on vitiating factors or subsequent agreement. Clarification on the scope of “subsequent agreement” whilst not forthcoming would certainly have been welcome.

The picture has, however, been blurred yet further with the somewhat slippery concept of the ambulatory constructive trust. Hale noted in *Stack* how Lord Hoffman in the course of argument in that case had raised the prospect of parties’ intentions changing over time under what he had termed an “ambulatory” constructive trust<sup>31</sup> and Hale gave the example of one party financing or constructing an extension to or major improvement of co-owned property “so that what they have now is significantly different from what they had then.”<sup>32</sup> Lord Neuberger (also in *Stack* albeit in a dissenting judgment) acknowledged, that party intentions could alter post-acquisition but argued that Hoffman’s “elegant characterisation [of ambulatory intentions] does not justify a departure from the application of established legal principles.”<sup>33</sup> He did accept, however, that a change in the parties’ intentions as to beneficial ownership would require “compelling evidence” of a post-acquisition agreement. Lord Neuberger suggested that subsequent “discussions, statements or actions”<sup>34</sup> may form the basis of an agreement from which the court could infer a change in intentions from that stated in an earlier express

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<sup>31</sup> *Stack* [2007] 2 A.C. 432 at [62].

<sup>32</sup> *Stack* [2007] 2 A.C. 432 at [70].

<sup>33</sup> *Stack* [2007] 2 A.C. 432 at [103].

<sup>34</sup> *Stack* [2007] 2 A.C. 432 at [138].

declaration of trust. It will be recalled that *Jones* was a case in which just such a change of intention was identified. The trial judge had made specific findings of fact that the parties' intentions had indeed changed post-acquisition as demonstrated by evidence of a "new plan" under which Mr Kernott cashed in an insurance policy and bought a new house for himself. The court concluded that the parties' intentions had clearly changed such that the original purpose of buying a house to create a home and raise a family had ended and Mr Kernott's interest in 39 Badger Hall Avenue had crystallised. This, confirmed the Supreme Court, was a change in intention that could be objectively and reasonably inferred from the conduct of the parties.<sup>35</sup> Once again, however, it must be remembered that the observations of Lady Hale and their Lordships in *Jones* that change to the parties' initial beneficial interest can be inferred from post-acquisition conduct must be read in the specific context of the case i.e. a case where there was no express declaration of trust.

More recently, the issue of the status of an express declaration of trust has again been examined and tested by the court in three important, under-acknowledged and under-examined cases: *Clarke v Meadus*<sup>36</sup> and *Pankhania v Chandegra*.<sup>37</sup> Both warrant closer analysis. At first instance in *Meadus*, Master Bragge dismissed the claim by a daughter to the entire equitable interest in a property, Bonavista, of which she and her mother were registered proprietors. The daughter had claimed to be absolutely entitled to the land despite the existence of an express declaration of trust under which she was said to enjoy a 50% share in the home. Master Bragge held that, "where there is an express declaration of trust, that is the end of the matter with respect of the court determining the parties' respective interests, unless one party applies for rectification or rescission of the deed."<sup>38</sup> The daughter's claim, that the express declaration had been varied informally either under a common intention constructive trust or via the doctrine of proprietary estoppel was therefore struck out. On appeal to the High Court, Warren J. held that Master Bragge had been wrong to strike out the daughter's claim; that summary proceedings for strike-out were not the appropriate forum for determining the case; the rightful setting being a full trial. Warren J.'s held:<sup>39</sup>

"It cannot, in my judgment, sensibly be argued that once beneficial interests have been declared in a formal document, those interests become immutable and incapable of being affected by a proprietary estoppel [or constructive trust]."

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<sup>35</sup> *Jones v Kernott* [2011] 1 A.C. 776 at [48].

<sup>36</sup> *Clarke v Meadus* [2010] EWHC 3117 (Ch).

<sup>37</sup> *Pankhania v Chandegra* [2012] EWCA Civ 1438.

<sup>38</sup> *Meadus* [2010] EWHC 3117 (Ch) at [40].

<sup>39</sup> *Meadus* [2010] EWHC 3117 (Ch) at [56].

Relying heavily on the reasoning in *Stack*, Warren J. noted that an express declaration of trust was “capable of being overridden by a proprietary estoppel in favour of [Mrs Clarke] as a result of promises and representations made”<sup>40</sup> post-acquisition and that Mrs Clarke had “a clearly arguable case” which should be examined at trial.<sup>41</sup> Warren J. continued that, in his view, the evidence that would be adduced to support the claim to variation of the declaration of trust by estoppel would be the same as for variation under a constructive trust and that, “Proprietary estoppel and ... constructive trust are simply different routes to the same result”<sup>42</sup> namely to provide Mrs Clarke with an interest greater than that provided for in the express declaration.

*Meadus* therefore indicated that it was entirely possible for an express declaration of trust to be varied informally either by way of the operation of proprietary estoppel (provided the elements of an estoppel claim can be proved) and that, “nothing in *Stack v Dowden* or *Goodman v Gallant* can be read as suggesting that this is not possible”<sup>43</sup> or under a constructive trust.<sup>44</sup> Yet there is an important characteristic to the case which cannot be overlooked. The case concerned summary proceedings and strike out and, as such, the issues were not fully-litigated and the legal complexities not aired and therefore left unresolved. Given these were summary proceedings, all that was required was that Warren J. be satisfied that Mrs Clarke had an arguable case and this was sufficient for the order of Master Bragge to be overturned.<sup>45</sup> This low threshold did not provide an opportunity for a meaningful consideration of the law on express declarations and, as a consequence, this has led to a degree of uncertainty as to the significance and implications of the judgment, with some indicating that “whether [*Meadus*] is a true statement of the current law remains to be seen.”<sup>46</sup>

The next episode in this important and evolving saga as to the status of express declaration is the decision of the Court of Appeal decision in *Pankhania*. In *Pankhania*, a property had been transferred into the joint names of an aunt and her nephew and, crucially, the transfer document included an express declaration of trust that the parties were to hold the land as tenants in common in equal shares. The property was originally purchased for the purposes of providing a family home for several family members. The aunt remained in occupation of the land but sought to have the nephew excluded and

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<sup>40</sup> *Meadus* [2010] EWHC 3117 (Ch) at [56].

<sup>41</sup> *Meadus* [2010] EWHC 3117 (Ch) at [57].

<sup>42</sup> *Meadus* [2010] EWHC 3117 (Ch) at [81].

<sup>43</sup> *Meadus* [2010] EWHC 3117 (Ch) at [42].

<sup>44</sup> Though, note that Warren J. made repeated reference to the “remedial” nature of the constructive trust. This jurisdiction does not currently recognise a remedial constructive trust but does permit the common intention constructive trust as seen in *Stack* and *Jones*: see *Meadus* [2010] EWHC 3117 (Ch) at [41].

<sup>45</sup> See Civil Procedure Rules (1998) Part 3A on strike out and Part 24 on summary judgment.

<sup>46</sup> M. Pawlowski, “Declarations of trust and beneficial shares” (2012) 18(10) *Trusts & Trustees*, 980, at 983.

argued that he held no interest in the land. The aunt contended that, notwithstanding the express declaration of trust, there had always been an understanding between the parties that the nephew was to have no interest whatsoever in the property and that he had been involved in its initial purchase merely to assist in securing a mortgage. The nephew, who had been paying a proportion of the mortgage instalments, sought an order for sale of the land and equal division of the proceeds in line with the terms of the express declaration. At first instance, H.H.J. Charles Harris Q.C. proceeded on the basis of the law as laid down in *Stack* and *Jones* and all but ignored the existence of the express declaration of trust. In so doing, he determined that the aunt was absolutely entitled to the land (by inference from the conduct of the parties) and refused the nephew's application for an order for sale. The matter came before the Court of Appeal, and Patten L.J. delivering the leading judgment (with which Mummery and Treacy L.J.J. agreed), was unequivocal that given the presence of an express declaration of trust evidencing the parties' intentions:<sup>47</sup>

"In these circumstances, there was no need for the imposition of a constructive or common intention trust of the kind discussed in *Stack* nor any possibility of inferring one because, as Baroness Hale recognised in paragraph 4 ... in that case, such a declaration of trust is regarded as conclusive."

In view of the declaration, the trial judge's imposition of a constructive trust in favour of the aunt was therefore "impermissible" unless the aunt could point to a ground on which the declaration was to be set aside. The trial judge had, said Patten L.J., "misunderstood" the nature of the declaration which spelled out the parties' express intentions as to beneficial ownership. The trial judge had been wrong to proceed, "upon the footing that he had a free hand to decide what was the common intention of the parties ... that inquiry was simply not open to him"<sup>48</sup> in the absence of grounds for going behind to displace the declaration. No fraud, mistake or undue influence was alleged and there was no basis for demonstrating that the declaration was a sham. Patten L.J. stressed that it had always been open to the parties, had they wished, to vary their beneficial interests by deed but they had not done so and thus were "bound by the legal consequences of what they have signed."<sup>49</sup> Mummery L.J.,<sup>50</sup> in a short judgment endorsing Patten L.J.'s approach, was even stronger still in his assessment of the status of the express declaration, holding, and "possibly with a hint of exasperation:"<sup>51</sup>

"There is no room for inserting a constructive trust in substitution for the express trust ... in the absence of a vitiating factor ... the court must give legal effect to the express trust declared in the transfer ...

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<sup>47</sup> *Pankhania* [2012] EWCA Civ 1438 at [13] (Patten L.J.).

<sup>48</sup> *Pankhania* [2012] EWCA Civ 1438 at [16].

<sup>49</sup> *Pankhania* [2012] EWCA Civ 1438 at [22].

<sup>50</sup> *Pankhania* [2012] EWCA Civ 1438 at [28].

<sup>51</sup> M. Dixon, "To write or not to write?" [2013] Conv. 1 at 3.

the court cannot go behind that trust ... reliance on *Stack v Dowden* and *Jones v Kernott* for inferring or imputing a different trust in this and other similar cases which have recently been before the court is misplaced where there is an express declaration of trust.”

Again, however, as in *Meadus*, there was a series of unusual features in this case largely concerning the case management process to which Patten L.J. drew attention, seemingly attempting to offer a generous lifeline to the trial judge whose judgment had been roundly criticised and overturned. These features, which “may not have helped”<sup>52</sup> the trial judge, included: the absence of any pleadings; the defendant suffering a serious heart attack and counsel for both parties focusing almost exclusively in their skeleton arguments on establishment or acquisition of an interest in the land through an assessment of the factual nexus rather than relying on the legal consequences of the declaration of trust. On one view, the crystal clarity and force of Patten L.J.’s judgment (and the dicta of Mummery L.J. which buttressed it) are all the starker in light of the rather irregular circumstances of the case.

The case of *Ladwa v Chapman*<sup>53</sup> offers a recent examination of the question of informal variation of an express declaration and is a case which exemplifies the more discretionary, holistic approach which accepts that the intentions of the parties can change, even where an executed TR1 is in existence. *Ladwa* was a decision of a District Judge sitting at first instance in the County Court at Central London and, in many ways, is typical of the issue which confronts legal practitioners. In this case, the Defendant, Ms Chapman had been in a relationship with the Claimant, Ms Ladwa, since 1999. In 2001 they purchased a property together at Whitehall Road, Woodford Green as tenants in common in equal shares. In 2002 they executed mirror wills, in each case leaving their one-half share to the other but on the death of the survivor of them, each partner’s estate was left as to 90% to the Defendant’s parents and 10% to the Claimant’s mother. In April 2007, Whitehall Road was sold and, in August 2007, Hill Top, London E4, was purchased in the Defendant’s sole name. In August 2008, the Defendant transferred (executing a TR1) Hill Top into the parties’ joint names to hold as joint tenants. The Claimant sought a declaration from the Court that following severance of the joint tenancy she was entitled to 50%. The Defendant disputed this. Her primary case was that the TR1 should be set aside on the grounds of undue influence as she alleged that she had been subjected to years of emotional abuse by the Claimant, in circumstances where her father had passed away and the Claimant had completed a law degree in September 2007, just after Hill Top was purchased. The Judge rejected the argument based on undue influence. What is of particular interest, however, is the ready acceptance from counsel for the Claimant and the Judge, drawing on *Stack* and *Meadus*, that:<sup>54</sup>

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<sup>52</sup> *Pankhania* [2012] EWCA Civ 1438 at [3].

<sup>53</sup> *Ladwa v Chapman* [2018] (August 2018 unreported).

<sup>54</sup> *Ladwa* [2018] (August 2018 unreported) at [106].

“the parties’ intentions might change after the date of the transfer. In the context of a domestic, family home ... a common interest constructive trust might subsequently arise by which the beneficial interests will change ... I do not see however that this question can be resolved other than by way of application of the approach adopted by the House of Lords in *Stack v Dowden*. Echoing Baroness Hale in that case, the burden must be on the defendant to show that the parties did subsequently intend their beneficial interests to be different from those which they had declared, and in what way.”

The Judge goes on to say:<sup>55</sup>

“I do not see how the burden upon a party seeking to show that a different common intention was reached subsequent to an express declaration by deed can be any less than that which rests upon a joint owner where there is no declaration of trust seeking to show that the beneficial interests are to be held other than jointly.”

This is perhaps something of an unusual remark given that it was not advanced on behalf of Ms Chapman that the burden should be the same and, additionally, it might be thought odd that the very same test for demonstrating common intention would apply to situations where there is a declaration as applies in those where there is none.

## **V. THE CASE FOR ASSERTING THE PRIMACY OF AN EXPRESS DECLARATION OF TRUST OR TR1**

The sum of the decided case law on the conclusiveness of an express declaration of trust, as explored in the previous section, results in a less than unambiguous picture. On the one hand, *Goodman*, *Pink* and *Pankhania* represent an apparently unassailable line of authority that express declarations of trust are indeed conclusive and binding subject to vitiating factors and establish, in crystal clear terms, that the operation of the doctrine of common intention constructive trust is entirely misplaced and flatly impermissible in the face of a valid express declaration. Against this position, on the other side, is the intoxicating pull of equity’s inherent flexibility interpolated into the law (particularly in the domestic context) by the House of Lords in *Stack* and confirmed by the Supreme Court in *Jones* suggesting that informal variation of a pre-existing declaration by inference through post-acquisition conduct is entirely possible. This sentiment, as we can see from *Meadus* and *Ladwa*, has now filtered down to the lower courts and into the consciousness and cognizance of legal practitioners diligently setting out to find novel ways to challenge the inviolability of express declarations. What remains is a not-as-yet conclusively resolved conflict between the conventional property law wisdom extolling the orthodox

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<sup>55</sup> *Ladwa* [2018] (August 2018 unreported) at [106].



preference for formality and the apparent common sense call to holism as espoused in *Stack*. This tension in land law is, in fact, nothing new and the debate as to the effect of express declarations of trust is but one example epitomising and exemplifying a wider and deeper clash between the tectonic plates of property law; of common law versus equity; of formality versus informality; of certainty versus fairness not to mention the on-going schism as to the true role of context in property law disputes.<sup>56</sup> Of course, these binaries are drawn overly-simplistically but it is clear that the debate as to the conclusiveness of express declarations of trust (whether or not it takes the form of a TR1) casts a searching spotlight on a central struggle in land law: the battle between formalism and the flexibility and conscience of equity; between writing and conduct. The question to which this article seeks to bring some clarity is the extent to which, as to express declarations of trust, the former (writing) can and should ever be trumped, subverted, overborne by the latter (inference from conduct). In this section, the arguments are gathered together to contend that the traditional view that written express declarations should prevail is to be preferred on the grounds of principle, precedent and pragmatism and, secondly, that if informal variation is to be permissible it should only be on the basis of proprietary estoppel and not according to an over-interpretation of the holistic approach taken in *Stack*, *Jones* and the discussion therein as to the ambulatory constructive trust.

First, as to principle, to uphold the terms of an express declaration of trust is to recognise a central tenet of land law, namely its insistence (dating back to the ground-breaking raft of 1925 legislation and earlier) that in dealings with land, formality is required. Formality in dealings with land, now necessitated by sections 52, 53 of the LPA 1925 (amongst many other areas of land law – including the Land Registration Act 2002) stems from the special place and unique attributes of land that set it apart from other forms of property. These special qualities exhibited by land of value, scarcity, uniqueness warrant a special recognition which is itself reflected in the need for writing.<sup>57</sup> The fact of land law as an amalgam of proprietary and contractual rights is also important. Proprietary rights, as Lord Wilberforce memorably explained in *National Provincial Bank Ltd v Ainsworth*<sup>58</sup> as rights “definable, identifiable by third parties, capable ... of assumption by third parties and [having] some degree of permanence or stability,” again, supports the demand for writing in dealings with land. The contractarian angle is particularly significant in bolstering the argument in favour of the conclusiveness of express declarations of trust. A written declaration of trust (in a deed) is the clearest expression of the parties’ contractual freedom and so it must be right that this contract should only be impugned and set aside if there is evidence that one or both parties entered into the contract on a false premise whether

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<sup>56</sup> N. Hopkins, “The relevance of context in property law: a case for judicial restraint?” (2011) 31(2) L.S. 175.

<sup>57</sup> P. Birks, “Before we begin: Five keys to Land Law”, in S. Bright., J. Dewar, *Land Law: Themes and perspectives* (Oxford: Oxford University Press, 1998) at 457-60.

<sup>58</sup> *National Provincial Bank Ltd v Ainsworth* [1965] A.C. 1175; [1965] 2 All E.R. 472.

that be as a result of mistake, fraud, undue influence or duress. The law should be very slow indeed to interfere with negotiated, expressly agreed terms contained within a formal deed and particularly so in the context of land law where the conveyancing process is undertaken with the assistance of legal advisors and a declaration or TR1 has been drawn up after receipt of legal advice.

Whilst this is not the place for a fulsome examination of the role of equity in modern land law, as Dixon<sup>59</sup> has argued, big questions are surely raised if formally executed declarations are readily superseded and provisions of law contained within sovereign legislation (e.g. LPA 1925) are subverted on the grounds of appealing to broad equitable notions of conscience or common sense. It is here that the over-interpretation, over-expansion and over-application of the *Stack* and *Jones* authority beyond its rightful boundaries is most pernicious and threatens the fundamental basis of our land law. It is hard to square such a disregard for the formalism of the law with ideas of democratic law-making, legitimacy and accountability. It is thus plainly unprincipled to distort *Stack* and *Jones* beyond their jurisprudential limits to permit the court to defeat and re-cast party intentions by inference (or ultimately even by imputation). This would see the equitable jurisdiction and the common intention constructive trust (equity's most productive progeny) stretched far beyond its founding principles of mitigating the harshness of the common law. This is not merely the gripe and bemoanings of crusty, property lawyers unhappy at the apparent erosion of land law in favour of an encroaching morass of fairness or familialisation<sup>60</sup> of property law post-*Stack* but goes to a more fundamental issue of principle: that it is legitimate for those of full age and capacity with intention to create legal relations who, after receiving legal advice, enter formal dealings with land which result in a written record of their expressed intentions captured in a formal contract, to expect that their wishes will be upheld in the absence of exceptional circumstances. The law should meet these reasonable expectations. It does this by asserting the primacy of the executed declaration of trust and by rejecting the possibility that this written evidence of the parties' negotiated intentions can be varied informally by conduct, constructive trust or estoppel. As Mason has identified, across legal disciplines and across the Common Law world, we are witnessing "equitable doctrine and relief ... extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint."<sup>61</sup> Mason forewarns us that:<sup>62</sup>

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<sup>59</sup> M. Dixon, "To write or not to write?" [2013] Conv, 1.

<sup>60</sup> J. Dewar, 'Land, Law and the Family Home' in S. Bright and J. Dewar, *Land Law: Themes and Perspectives* (Oxford: OUP, 1998); J. Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467; A. Hayward, 'Family Property and the Process of Familialisation of Property Law' (2012) 24(3) *Child and Family Law Quarterly*, 284.

<sup>61</sup> A. Mason, "The place of equity and equitable remedies in the contemporary common law world" (1994) 110 L.Q.R. 238 at 238.

<sup>62</sup> A. Mason, "The place of equity and equitable remedies in the contemporary common law world" (1994) 110 L.Q.R. 238 at 259.

“Because the concepts employed are not susceptible to sharp definition, there is the risk of some erosion in the apparent distinctions between equitable concepts such as ‘unconscionable’ and ‘inequitable’ and common law concepts such as ‘unfair’ and ‘unreasonable’.”

There are those, such as Burrows, who advocate a closer relationship and intermingling of law and equity and that “substantive inconsistencies between common law and equity be eradicated” by “taking fusion seriously.”<sup>63</sup> However, in so far as this would result in equity chipping away at the formalism of the common law, this is to be resisted. As Dixon has argued: “the holistic approach of *Stack* is not, and is not intended to be, an opportunity to undo what is otherwise valid, clear and certain.” To license and sanction an undoing of a written, express declaration of trust on the grounds of equitable concepts which are seemingly drawing closer to and becoming synonymous with ill-defined (if laudable) concepts of fairness and reasonableness and to permit the breakdown of the clear boundaries between formalism and equity’s conscience would be to open Pandora’s box.<sup>64</sup>

A second argument in favour of the conclusiveness of express declarations can be made on the grounds of precedent. It is argued that to re-assert the primacy of the terms of an express declaration and to reject the viability of a broad discretion permitting informal variation is entirely faithful to the line of case law authority reaching back decades which has repeatedly underscored and affirmed that express declarations of trust are, unless vitiating grounds are made out, unassailable and binding. As the previous section of this article has explored, there is, at first blush, case law on both sides of the argument but, as a matter of strict *stare decisis*,<sup>65</sup> the authority of *Goodman* in the Court of Appeal (endorsing Lord Upjohn’s comments in *Pettitt* in the House of Lords) must stand and indeed has been subsequently recognised as representing the law in *Pankhania* and cited with approval in the House of Lords in *Stack*. Attempts by practitioners and members of the judiciary, for example, in *Meadus*, to use the authority of *Stack* and *Jones* to argue that the court is permitted to look behind the expressly-stated intentions of parties both misrepresents and misunderstands the discussion of this issue in *Stack* and *Jones* and, overlooks the crucial aspect that, in both cases, there was no express declaration of trust in play. To interpret these cases as a green light heralding a ‘free for all’ or an approach that ‘everything is up for grabs’ is wrong as a matter of precedent. As the court made plain in *Stack* and *Jones*, had the parties executed express declarations of trust, their analyses would have been quite different. Lord Walker in *Jones* explained that, in the absence of a declaration, the court’s task is:<sup>66</sup>

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<sup>63</sup> A. Burrows, “We Do This At Common Law But That In Equity” (2002) 22(1) O.J.L.S. 1.

<sup>64</sup> M. Dixon, “To write or not to write?” [2013] Conv. 1 at 5.

<sup>65</sup> See House of Lords’ Practice Statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234).

<sup>66</sup> *Jones* [2011] 1 A.C. 776 at [47].

“to deduce what [the parties’] actual intentions were at the relevant time. It cannot impose a solution upon them which is contrary to what the evidence shows that they actually intended. But if it cannot deduce exactly what shares were intended, it may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time. This is a fallback position which some courts may not welcome, but the court has a duty to come to a conclusion on the dispute put before it.”

Logically, it follows that if there is an express declaration of trust, it should be upheld and the ‘fallback’, holistic, broad, contextualised search for common intention laid down in *Stack* and clarified in *Jones* under a constructive trust simply does not and should not arise. Arguments founded on inference (or imputation) as to the parties’ respective beneficial entitlements, in this circumstance, have no place. It is suggested that the confusion and the erroneous interpretation as to the true scope of *Stack* and *Jones* is, in large part, due to the acceptance by the court both in *Stack* (and more wholesomely) in *Jones* that the intentions of the parties as indicated at acquisition of co-owned land can change and shift over time and that such change can be demonstrated by and inferred from conduct alone under an ambulatory constructive trust. However, once again, this betrays a misunderstanding in that it fails to grasp that the whole discussion of shifting intentions was grounded in a context which pre-supposes the absence of an express declaration. In *Jones*, neither Lady Hale nor any of their Lordships referred, on the issue of express declarations, to *Pettitt* or *Goodman*. Unless and until the authority of *Goodman* is revisited specifically on this point, the comments in *Stack* and *Jones* as to ambulatory intentions must be read as applicable only in cases where no express declaration of trust has been executed.

Particular mention is required as to Hale’s comment in *Stack* that an express declaration can be “varied by subsequent agreement or affected by proprietary estoppel: see *Goodman*.”<sup>67</sup> Of course, this was not a live issue in *Stack* and so her comments are strictly obiter but worthy, nonetheless, of interrogation and it is the opinion of the authors that it is around these two comments that in practice any potential for future development of the case law lies. Clearly, it is open to the parties to vary an earlier express declaration by executing a later, written deed of variation. Perhaps this is what Hale meant by “subsequent agreement” here? If, however, Hale was suggesting that an express declaration could be varied informally under a constructive trust, then she has failed to identify a valid legal precedent for such a position nor engaged with the case law holding that such an approach is impossible: *Wilson, Leake* and *Clarke v Harlowe*. Hale’s reference to *Goodman* here is also rather perplexing and misplaced as nowhere in *Goodman* does the court suggest that variation by subsequent agreement is in any sense permissible.

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<sup>67</sup> *Stack* [2007] 2 A.C. 432 at [67] (Baroness Hale).

Hale's reference to variation by proprietary estoppel (jumped on and applied in *Meadus*) provides, in practice, far more fertile ground for an argument for informal variation of the terms of an express declaration of trust. However, precisely how proprietary estoppel operates in this space to vary a pre-existing express declaration of trust requires further thought for, although it is widely-acknowledged that estoppel by its very nature operates outside formality rules, again it was not approved in *Goodman* and there is rightly a long-standing and reasoned objection to the application of informal doctrines that contradict the formality requirements stipulated in legislation. Thus, while s53(2) of the LPA 1925 contains a statutory exception to the formality requirements for implied trusts, no exception is made for proprietary estoppel: see, for example, discussion of the interplay between estoppel and section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 in *Cobbe v Yeoman's Row Management*.<sup>68</sup> In so far as *Meadus* sought to carve out the prospect of informal variation of an express declaration by proprietary estoppel, this must now be read in light of the unequivocal judgment of Patten L.J. in *Pankhania*, which although did not cite *Meadus*, is a judgment of a superior court and clearly inconsistent with it. That is not to say that estoppel as a means of departure from the parties' common intentions as set out in a TR1 form or express declaration is necessarily closed as an avenue for argument but rather that how it operates must be clearly delimited and circumscribed. An extensive discussion of the doctrine of proprietary estoppel is, however, outwith the scope of this article. As things currently stand, Hale's comments as to informal variation represent, at best, obiter statements and, at worst, an unsubstantiated and unprincipled discussion of the key issues. There remains, at present, therefore, no clear precedent for informal variation of an express declaration whether by constructive trust or proprietary estoppel.

In any event, one could argue that Hale's views in *Stack* on informal variation are, perhaps ironically, qualified by her strong comments on the desirability of parties expressly declaring their interests by completing a TR1 form. She was quite explicit that:<sup>69</sup>

"Form TR1 ... provides a box for the transferees to declare whether [parties] hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear."

This very much echoed the view adopted by the Law Commission in its 2002 Discussion Paper, *Sharing Homes* in which the Commission offered unqualified support for the "robust approach of the court in *Goodman v Gallant*" noting:<sup>70</sup>

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<sup>68</sup> *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752.

<sup>69</sup> *Stack* [2007] 2 A.C. 432 at [52].

<sup>70</sup> Law Commission No. 278, *Sharing Homes: A Discussion Paper* (2002) at [2.2].

“We believe that those sharing homes should be given every encouragement to stipulate expressly for their beneficial entitlement. If that is to be the case, **it is essential that courts strictly enforce declarations of trust which have been freely and fairly made by the parties.**” [Emphasis added].

Indeed, it was in response to Hale’s comments in *Stack*, that the Law Society and Land Registry issued a Practice Note on Joint Ownership<sup>71</sup> to coincide with the introduction of the new JO form for registered titles under which parties, at the time of purchasing land, could declare their respective beneficial entitlements. The Note acknowledges that it had been hoped that *Stack* and *Jones* might resolve and clarify the status of express declarations but instead had “only demonstrated the many difficulties”<sup>72</sup> remaining in the law in the area. The Note continues that declaring interests at the outset provides clarity as to parties’ intentions and could help to avoid disputes in the future. As to conclusiveness, it records that in line with *Goodman* and *Pankhania*, “an express declaration ... is generally conclusive and ... the Court must give it legal effect unless there is a vitiating factor, such as fraud or mistake.”<sup>73</sup> It concludes by urging conveyancing solicitors to explain to clients both the benefits of an express declaration and the risks of not completing one.

Where does all this leave us? The practical result is that *Stack* and *Jones* are confined to contexts in which there is no express declaration of trust. This leaves *Goodman* emphatically endorsed recently by the Court of Appeal in *Pankhania* (and the cases that had previously affirmed *Goodman* including *Cowcher v Cowcher*, *Bernard v Josephs*, *Carlton v Goodman*) as binding precedent. It is the view of the authors that case law precedent bars a claim to informal variation on the basis of a common intention constructive trust but that, going forward, development in the law must focus on exploring the extent and operation of vitiating factors as displacing an express declaration of trust and, in particular, how variation on the grounds of proprietary estoppel might operate. Without a Supreme Court judgment deliberately overturning *Goodman*, however, the conclusiveness of express declarations of trusts (subject only to the vitiating factors and the potential operation of proprietary estoppel) must be seen as unassailable and re-asserted as such.

Thirdly, finally and quite apart from the arguments above, there are strong grounds for upholding the conclusiveness of express declarations founded on pragmatism. Simply put, to permit the expressly-declared wishes of co-owners to be overridden or varied informally by inferences from post-acquisition conduct is to open the floodgates to lengthy, traumatic, costly litigation which is readily and easily

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<sup>71</sup> Law Society Practice Note, *Joint Ownership* (2013).

<sup>72</sup> Law Society Practice Note, *Joint Ownership* (2013) at [1.2].

<sup>73</sup> Law Society Practice Note, *Joint Ownership* (2013) at [2.2].

bypassed. Lord Walker in *Jones*<sup>74</sup> acknowledged the potential for express declarations (through completion of the TR1 form) to “avoid [the] uncertainty” and litigation involved when a wholesale search for the parties’ common intention is engaged. Baroness Hale in *Stack* made this point more emphatically in arguing that if the TR1 was invariably completed and executed as a deed the problem confronting them would disappear, as noted previously.<sup>75</sup> Hale’s observations were taken as a clear signal to Land Registry to consider whether the TR1 should be reformed so as to make it compulsory for co-owners when acquiring land to execute a declaration of trust and/or complete panel 10 of the TR1. Picking up on Hale’s rather unsubtle nudge, Land Registry established a Working Party to, “assess what should be Land Registry’s response to that heavy hint from the House of Lords.”<sup>76</sup> The Working Party recommended that there be reform either to the procedure taken by Land Registry where panel 10 was not completed or, in the alternative, that execution of the TR1 be made mandatory as Hale had indicated. Elizabeth Cooke, who sat as an academic member of that Working Party, wrote after the Working Party’s recommendations had been published, of the practical benefits of completing a TR1 and the serious implications of not doing so. Cooke noted the “disastrous consequences” and significant costs that flow from a failure to declare explicitly how the land is to be held, including depleting much of the value of the property in wasted litigation. Sadly, the government subsequently announced a moratorium on any new regulation affecting start-up and micro-businesses and the Party’s reforms were not taken up. Today, then, completion of the TR1 remains voluntary as does completion of the additional JO form introduced post-*Stack* by Land Registry which, as we have already encountered, provides an alternative (but rarely used) means by which parties can declare their beneficial interests in land. With execution of the TR1 and JO forms being non-compulsory (despite the strong arguments indicating it should be mandatory) the pragmatic justifications for the court adopting a strict line on the conclusiveness of express declarations is further emboldened.

The pragmatic case for the benefits to parties of expressly declaring their intentions was made perhaps most forcefully of all by Ward L.J. in *Carlton v Goodman*<sup>77</sup> who explained with a dose of palpable frustration:<sup>78</sup>

“I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and a tenancy in common, ascertain what they want and then expressly declare in the conveyance or transfer how the beneficial interest is to be held because that will be conclusive and save

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<sup>74</sup> *Jones* [2011] 1 A.C. 776 at [18].

<sup>75</sup> *Stack* [2007] 2 A.C. 432 at [52].

<sup>76</sup> E. Cooke, “In the wake of *Stack v Dowden*: the tale of the TR1” [2011] *Fam. Law*. 1142.

<sup>77</sup> *Carlton v Goodman* [2002] EWCA Civ 545; [2002] 4 WLUK 587.

<sup>78</sup> *Carlton* [2002] EWCA Civ 545 at [44].

all argument. When are conveyancers going to do this as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do.” [Capitalisation in the original text].

Ward L.J. offers a colourful and timely reminder of the simple and unfussy logic of parties settling what their intentions as to co-owned property actually are, recording those at the outset in writing and thereby obviating potential pitfalls and disputes down the track. By contrast, even a cursory reading of the judgments in *Stack* and *Jones* demonstrates the complexity, indeterminacy and unpredictability of the court’s exercise in search of common intentions in the absence of any express declaration of trust. In short, all this ire, cost and uncertainty can be eschewed if express declarations are executed and if the law (and more specifically conveyancing solicitors) insisted on completion of the TR1 and/or JO forms to declare how co-owned property is held beneficially. Naturally, however, both conveyancers and co-owners will only see the fruits of this compulsion to declare beneficial entitlements if the courts support the precedent of *Goodman* and *Pankhania* and assert the primacy of express declarations of trust as this article advocates.

## VI. CONCLUSION

This article has identified and examined a hitherto unresolved but important issue of formality in property law: the extent to which a formally executed declaration of trust (whether or not comprised in a TR1 form) is conclusive of the parties’ beneficial interests in co-owned land or whether, as seems to be a growing perception amongst legal practitioners and certain members of the judiciary, the court is permitted to go behind that express declaration to vary its terms informally on the basis of the highly flexible and holistic approach to common intentions espoused in *Stack* and in *Jones*. This article has located the conventional property law wisdom which insists on the virtue, inviolability and necessity for formality and writing in dealings with land as well as exploring the cases which have challenged this orthodoxy from *Stack* and *Jones* to the recent judgments in *Meadus*, *Pankhania* and *Ladwa*. In examining these cases, it has been argued that, whether on the grounds of principle, precedent or pragmatism, where there is written evidence of parties’ intentions as to their respective beneficial interests in co-owned land, the search for common intention should, in the first instance, begin and end with that declaration of trust subject only to the exceptional circumstances of the existence of vitiating factors and potentially a claim based on proprietary estoppel. Those practitioners and judges arguing against this position have, with respect, overlooked the simplicity, logical clarity and binding case law precedent on this issue; blinded or perhaps seduced by the heady lure of the broadly-drawn equitable discretion advocated in *Stack* and *Jones*. It has been argued here that this must be resisted. The case has therefore been made for re-asserting the primacy of express declarations of trust and for rejecting the



possibility that such declarations might be undone by the expanding equitable jurisdiction whether through operation of the constructive trust. Whilst the law may have “moved on in response to changing social and economic conditions”<sup>79</sup> as noted notoriously in *Stack*, it has not moved and should not move so far as to permit the dislocation of a fundamental tenet of property law that holds that express party intentions, contained in a deed, cannot be dislodged on the basis of subsequent informal dealings or conduct. As Dixon has put it so eloquently:<sup>80</sup>

“That quintessential expression of equity’s conscience—the constructive trust in the family home—must yield to the formalism of the law.”

A Supreme Court decision confirming the binding authority of *Goodman* and *Pankhania* and endorsing the approach taken in this article would be a welcome means of settling for a generation a significant matter of land law formality which, if left unresolved, has the potential to lead to unnecessary and costly litigation.

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<sup>79</sup> *Stack* [2007] 2 A.C. 432 at [60] (Baroness Hale).

<sup>80</sup> M. Dixon, “To write or not to write?” [2013] Conv. 1 at 5.